Supreme Court of the United States.

OCTOBER TERM, 1901.

MARTHA J. SWERINGEN,
Plaintiff in Error,
vs.
THE CITY OF ST. LOUIS,
Defendant in Error.

No. 187.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

STATEMENT AND BRIEF FOR PLAINTIFF IN ERROR ON MOTION TO DISMISS OR AFFIRM.

This is an action of ejectment to recover possession of alluvion, formed by accretions to the west bank of the Mississippi River, in the City of St. Louis, Missouri. The pleadings and judgment of the State Circuit Court are sufficiently set forth in defendant's statement.

The writ of error was issued in this case within two years after the judgment was rendered in the Supreme Court of Missouri, as required by Secs. 1003 and 1008, Rev. Stats. U. S.; Allen vs. Southern Pacific Railroad Co., 173 U. S., 479, 484.

There are two federal questions raised by the record in this case, both of which were decided adversely to the plaintiff in error. They are first, the construction placed on the patent from the United States to Louis Labeaume or his legal representatives, dated March 25, 1852, for the land embraced in a Spanish Concession and survey to him, and which was confirmed to him by what is commonly called the "Old Board of Commissioners"; and second, the construction placed on the Act of Congress approved June 6, 1874, the first section of which is as follows:

"That all of the right, title and interest of the United States in and to all the lands in the State of Missouri, which have at any time heretofore been confirmed to any person or persons by any act of Congress, or by any officer or officers, or Board or Boards of Commissioners, acting under and by authority of any act of Congress, shall be, and the same are hereby granted, released and relinquished by the United States, in fee simple, to the respective owners of the equitable titles thereto, and to their respective heirs and assigns forever, as fully and completely in every respect whatever, as could be done by patents issued therefor according to law;" 18 U. S. Stats. at Large, p. 62.

Plaintiff in error, on the trial of the cause in the State Circuit Court, read said patent, record, p. 14, in evidence, and a complete and unquestioned chain of

title, record, pp. 26, 28, 30, 76, 80 and 82, consisting of deeds from Louis Labeaume, down to her trustees, she then being a married woman, vesting the legal title in them for her use, of lots Nos. 33, 34 and 35, of City Block No. 308E, of the City of St. Louis, Missouri, as they existed in 1842, which lots were a portion of the land embraced in said Spanish Survey, confirmation and patent, and were bounded on the east by the Mississippi River, by said Spanish Survey and confirmation, and each of the deeds in said chain of title. The premises sued for are composed of alluvion, formed by accretions to said lots since the execution of said deeds. The husband of plaintiff in error died in the year 1872, and the statute of uses vested the legal title to said lots in her; Roberts vs. Mosely, 51 Mo., 282, 286; Baker vs. Nall, 59 Mo., 265, 268.

United States Survey No. 3333, for which said patent was issued, is stated therein to be a *retracing* of the lines of said Spanish Survey, and the eastern line of the former survey, to begin at and run from a point (or corner) at the mouth of the Rocky branch, "down the right bank of the Mississippi River, with the meanders thereof, between high and low-water mark," to the beginning corner, a point also between high and low-water mark. The course of this line changes four times, and it has six fixed points including the beginning and ending points. There is also a plat embraced in said patent, which plaintiff in error contended showed that there was no land between said east line of said Survey No. 3333 and said river, only a sand bar plainly marked "Mississippi River"; record, p. 14.

When plaintiff in error offered said patent in evidence, counsel for defendant in error objected as follows:

"Mr. Allen: We object to the patent as irrelevant and immaterial, and not tending to support the issues in this case and not showing plaintiff to be a riparian proprietor."

"Court: Objection overruled."

"To which ruling defendant excepted at the time;" record, p. 13.

Defendant again challenged the validity of said patent by reading in evidence a patent to Rufus Easton, dated May 1, 1826, for United States Survey No. 2042, claiming that it showed an outstanding title to the premises sued for; record, p. 275.

At the conclusion of said trial plaintiff in error asked, and the Court gave, the following instructions:

"The Court declares the law to be that the conveyances read in evidence by plaintiff vested the legal title to lots number thirty-three, thirty-four and thirty-five, described in a portion of said conveyances, in the trustees of Martha J. Sweringen, and constituted the owners thereof riparian proprietors.

"The Court further declares the law to be that any addition made to the land described in the deeds read in evidence by plaintiff to Martha J. Sweringen's trustees, by gradual or imperceptible deposits from the Mississippi River, is to be taken and considered, as formed, as a portion of the land described in said deeds" * * *; record, p. 283.

A verdict was rendered in favor of plaintiff in error, and judgment was entered thereon, for possession and damages. Defendant appealed to the Supreme Court of Missouri, which reversed said judgment and rendered

a judgment in favor of defendant in error, deciding that the land granted to Louis Lebeaume was not bounded on the east by the Mississippi River; that the Court below erred in overruling the objection of defendant to the introduction of said patent in evidence; that Lebeaume was not a riparian owner, and that, therefore, the plaintiff in error, as his grantee, could not recover the land in suit as an accretion. Further, that plaintiff in error having no color of title to the land sued for, her previous possession of the same was insufficient to enable her to recover possession of it.

These rulings constitute the substance of the errors assigned herein in various forms; record, pp. 1 and 302.

We shall first present the federal question raised on this record under said patent.

The construction placed upon said patent by said decision, is such as to impair the validity and efficiency claimed for it by plaintiff in error, in the Court below, and deprive her of her title to the premises sued for, claimed under it.

Said construction so placed upon said patent, confers on this Court jurisdiction to review said decision under Sec. 709, Rev. Stat. U. S.

In Gill vs. Oliver, 11 How. (52 U. S.), 529, 547, it is said:

"If neither the validity nor the construction of the patent or title under the treaty is contested, if both parties claim under it, and some question without or dehors the patent or the treaty, it is plainly no case for our interference under this section;" Blackburn vs. Portland Gold Mining Co., 175 U. S., 571, 586.

And in Packer vs. Bird, 137 U. S., 661, 669, the Court uses the following language:

"The Courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the States for their grants; but whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the States, subject to the condition that their rules do not impair the efficiency of the grants or the use and enjoyment of the property granted;" Shively vs. Bowlby, 152 U. S., 1, 9, 44; Hill vs. Hompton, 4 Sawyer, 195; Kenyon vs. Squire, 1 Wash., St., 9.

This doctrine has often been applied by this Court to the construction of patents bordering on streams or other waters, generally without question or comment in regard to its jurisdiction to do so, under said Sec. 709.

In Shively vs. Bowlby, 152 U. S., 1, 9-10, occurs the following:

"The ground against its validity (a U. S. patent) proceeded upon the ground that the grant from the United States upon which it was founded, passed no title or right as against subsequent deeds from the State, in lands below high water mark. This is a direct adjudication against the validity of a right claimed under a law of the United States, and presents a federal question within the jurisdiction of this Court. Rev. Stat., 709. That jurisdiction has been repeatedly exercised, without objection or doubt, in similar cases of writs of error to State Courts;" Packer vs. Bird, 137 U. S., 661, 669; Knight vs. U. S. Land Ass., 142 U. S., 161, 176; Grand Rapids & Indiana Rd. Co. vs. Butler, 159 U. S., 87, 92; County of St. Clair vs. Lovingston, 23 Wall. (90 U. S.), 46, 63; Barney vs.

Keokuk, 94 U. S., 324, 336; Railroad Co. vs. Schurmeier, 7 Wall. (74 U. S.), 272, 284. And see also Hill vs. Hompton, 4 Sawyer, 195; Kenyon vs. Squire, 1 Wash., 9; Jefferis vs. East Omaha Land Co., 134 U. S., 178, 189; Hardin vs. Jordan, 140 U. S., 371, 380; Mitchell vs. Smale, Id., 406, 410.

The alluvion formed by accretions to said patent, or the grant by said act of Congress, became a portion of the land granted as fast as it was formed and was vested thereby in said Labeaume or his legal representatives.

In New Orleans vs. United States, 10 Pet. (35 U. S.), 662, 717, the Court said:

"The question is well settled at common law, that the person whose land is bounded by a stream of water, which changes its course gradually by alluvial formations, shall still hold the same boundary, including the accumulated soil;" Jefferis vs. East Omaha Land Co., 134 U. S., 178, 189-196; Schools vs. Risley, 10 Wall. (77 U. S.), 91, 110; County of St. Clair vs. Lovingston, 23 Wall. (90 U. S.), 46,68; Jones vs. Johnston, 18 How. (59 U. S.), 150, 155; Jones vs. Soulard, 24 How. (65 U. S.), 41, 63; Banks vs. Ogden, 2 Wall. (69 U.S.), 57, 67; St. Louis vs. Rutz, 138 U. S., 226, 241, 245; Saulet vs. Shepherd, 4 Wall. (71 U. S.), 502, 508; Nebraska vs. Iowa, 143 U. S., 359, 360; Campbell vs. Laclede Gas Light Co., 84 Mo., 352, 372; Benne vs. Miller, 149 Mo., 228, 238; Gorton vs. Rice, 153 Mo., 676, 683; McBaine vs. Johnson, 155 Mo.,191, 200; Land Co. vs. Thompson, 157 Mo., 647, 654.

This is irrespective of the question as to whether the grant carries title to high or low water mark. Com-

menting on this proposition in Shively vs. Bowlby, 152 U. S., 1, 35, the Court said:

"The rule, everywhere admitted, that where the land encroaches upon the water by gradual and imperceptible degrees, the accretion or alluvion belongs to the owner of the land, is equally applicable to lands bounding on tide waters or on fresh waters, and to the King or State as private persons; and is independent of the law governing the title in the soil covered by the water;" Handly vs. Anthony, 5 Wheat. (18 U. S.), 374, 380; Jefferis vs. East Omaha Land Co., 134 U. S., 178, 189-193; Nebraska vs. Iowa, 143 U. S., 359, 360; County of St. Clair vs. Lovingston, 23 Wall. (90 U. S.), 46, 68; Barney vs. Keokuk, 94 U. S., 324; Meyers vs. St. Louis, 8 Mo., App., 266, 272; Cooley vs. Golden, 117 Mo., 33, 48.

In the construction of a patent the construction of the Act of Congress under which it was issued is drawn directly in question, and the same is true in the construction of all acts of public officers of the United States, under an Act of Congress.

The following is an extract from the opinion in Shoshone Mining Co. vs. Rutter, 177 U. S., 505, 511:

"It is settled that all questions of fact are determined by the land department, and that after the issue of a patent only questions of law are open for consideration in the courts, and as the laws of Congress alone determine the matter of the disposal of the public lands, it follows that the questions of law which are thus open for consideration are those arising under Acts of Congress." And in Ross vs. Doe, 1 Pet. (26 U. S.), 655, 664, where plaintiff and defendant each claimed title under a U. S. patent (662, 663), the Court said:

"In this case the titles of both parties are derived under an Act of Congress; the construction of the statute is drawn directly in question; and the decision of the highest court of law of the State is against title and right of the party, specially set up in his defense under the statute. This case is not distinguishable from the case of Mathews vs. Zaine, 4 Cranch, 382, in which the jurisdiction of this Court was maintained;" Bawdlin vs. Stark, 107 U. S., 463, 464; Shively vs. Bowlby, 152 U. S., 1, 9; Hussman vs. Durham, 165 U. S., 144, 147; Pickering vs. Lomax, 145 U. S., 310, 313; Glasgow vs. Baker, 128 U. S., 560, 571; Wallace vs. Parker, 6 Pet. (31 U. S.), 680, 686; Neilson vs. Lagow, 7 How. (48 U. S.), 772, 775; Bell vs. Hearne, 19 How. (60 U. S.), 252, 263; Cousins vs. Labatut, 19 How. (60 U. S.), 202, 207; Berthold vs. McDonald, 22 How. (63 U. S.), 334, 338; Little vs. Arkansas, 22 How. (63 U. S.), 193, 202; Maguire vs. Tyler, 1 Black (66 U. S.), 195, 202; Reichert vs. Felps, 6 Wall. (73 U. S.), 160, 165; Silver vs. Ladd, 6 Wall. (73 U. S.), 440.

This Court can review the judgment of a State Court only when the question was presented in the latter Court in accordance with the provisions of Sec. 709, Rev. Stats. U. S., and decided adversely to the claim so presented. There is no particular time or form in which this must be done, nor need it be stated in words that it is a federal question. If the intent to present the federal question clearly appears from the record, or by necessary intendment therefrom, although it may not have been stated in terms in the record or opinion of the State Court, it is sufficient, and the same is true if the question was necessarily raised on its record, without directly referring to it in any manner.

In Crowell vs. Randell, 10 Pet. (35 U. S.), 368, 398, the Court said:

"That it is not necessary that the question should appear on the record to have been raised, and the decision made in direct and positive terms, *ipsissimis verbis*, but that it is sufficient if it appears by clear and necessary intendment that the question must have been raised, and must have been decided, in order to have induced the judgment;" Hickie vs. Starke, 1 Pet. (26 U. S.), 94, 98; Murray vs. Charleston, 96 U. S., 432, 439-443; Chapman vs. Goodnow, 123 U. S., 540, 548; Des Moine Nav. & Rd. Co. vs. Iowa Homestead Co., 123 U. S., 552, 554; Kaukauna Co. vs. Green Bay & Canal Co., 142 U. S., 254, 269; Columbia Co. vs. Electric Co., 172 U. S., 475, 488; Keokuk & Hamilton Bridge Co. vs. Illinois, 175 U. S., 626, 633; Yazoo & Miss. V. Ry. Co. vs. Adams, 180 U. S., 1, 9, 14; Mallet vs. State, 181 U. S., 589, 592.

The federal question under said patent, as we have seen, arises upon the construction of a federal statute, and the authority exercised by a public official of the United States under it. It comes within the provisions of the first clause of said Sec. 709, and therefore need not have been "specially set up or claimed" in the State Court. The latter provision applies to the third clause only of said section, and in some rare cases not even to it; Columbia Co. vs. Electric Co., 172 U. S., 475, 487-489; Telluride Power Co. vs. Rio Grande Ry. Co., 175 U. S., 639, 643; Yazoo & Miss. V. Ry. Co. vs. Adams, 180 U. S., 1, 14.

This federal question was not only raised in this case, but also "specially set up" and "claimed" by plaintiff in error, on the trial in the State Circuit Court, by reading the patent to Louis Labeaume or his

legal representatives (which contains an express reference to the Act of Congress under which it was issued, stating its title and date of approval), in evidence against the objections made to its introduction, and a chain of title from him to her, and by asking instructions, which were given, declaring her to be a riparian proprietor and owner of any alluvion formed by accretions, to her land; record, p. 283; Ross vs. Doe, 1 Pet. (26 U. S.), 655, 662-664; Kissell vs. St. Louis Public Schools, 18 How. (59 U. S.), 19, 26-27; Berthold vs. McDonald, 22 How. (63 U. S.), 334, 338-339.

The opinion of the Supreme Court of Missouri in this case is a part of the record, made so by rule 8 of this Court, and by the Revised Statutes of Missouri, 1899, which statutes are as follows:

"Sec. 871. In each case determined by the Supreme Court or Court of Appeals, or finally disposed of upon a motion, the opinion of the Court shall be reduced to writing and filed in the cause, and shall show which of the judges delivered the same, and which concur therein or dissent therefrom."

* * * * * * * * *

"Sec. 873. The Clerk of the Supreme Court shall, when the opinion of the court is filed in his office, endorse thereon the day on which it is filed, and enter the same on his minutes." * * *

It appears from said opinion in this case, record, p. 291, that this federal question was raised in it, to-wit: That she claimed title to the premises sued for under the patent from the United States to Louis Labeaume or his legal representatives, and the decision was

against the validity of said patent in regard to said claim, and those statements alone confer on this Court jurisdiction to review the decision of the State Court; Cass Farm Co. vs. Detroit, 181 U. S., 396, 397; Loeb vs. Trustees of Columbia Township, 179 U. S., 472, 483; Water Power Co. vs. Street Ry. Co., 172 U. S., 475, 488; Eagan vs. Hart, 165 U. S., 188, 189; Gross vs. U. S. Mortgage Co., 108 U. S., 477, 484; Dibble vs. Billingham Bay Land Co., 163 U. S., 63, 69; Kreiger vs. Shelley Railroad Co., 125 U. S., 39, 44; Philadelphia Fire Ass. vs. New York, 119 U. S., 110, 116; United States vs. Taylor, 147 U. S., 695, 700.

The federal question under said Act of Congress is as follows:

The statements in the patent to Louis Labeaume or his legal representatives, establish a Spanish concession to him of the land to which the premises sued for are an accretion, in 1799, a survey of the same by Antoine Soulard, Surveyor of the Province, in the same year, a confirmation on September 22, 1810, by commissioners appointed for that purpose, commonly called the "Old Board of Commissioners," to said Louis Labeaume, agreeably to said concession, and that on June 14, 1811, they issued to him a patent certificate, numbered 982, for said confirmation, record, p. 14 (all done in pursuance of the provisions of the Treaty of Paris). The patent also contains a copy of said Soulard's survey, from which it is plainly obvious to the naked eye, that the latter survey and confirmation were bounded on the east by the Mississippi River, and it is so stated to be bounded in said patent. **It is further stated therein that accretions had formed to said Soulard's survey to the extent of about fourteen acres at the time U. S. Survey No. 3333 was**

executed, and that they were included in this latter survey and account in part at least for the excess of land in the latter over the former survey and that said accretions appeared to be rapidly advancing, record, p. 23.

Said confirmation vested the equitable title to the land confirmed, in said Labeaume, and it was final and binding on the United States; Strother vs. Lucas, 12 Pet. (37 U. S.), 410, 454; Les Bois vs. Brammel, 4 How. (45 U. S.), 449, 457, 463; Landes vs. Brandt, 10 How. (51 U. S.), 348, 370; Willot vs. Sandford, 19 How. (60 U. S.), 79, 80.

If said patent was defective and failed to convey said confirmation, or any part thereof, to said Labeaume or his legal representatives, then said Act of Congress of June 6, 1874, conveyed the same; Campbell vs. Laclede Gas Light Co., 119 U. S., 445, 446. And see also Ryan vs. Carter, 93 U. S., 78, 81.

Said opinion of the Supreme Court of Missouri denies to plaintiff in error any title to the land sued for, under said confirmation and Act of Congress of June 6, 1874, in the following language:

"Whatever may have been the original Spanish Concession, the survey and patent made under the confirmation, in 1852, must control as to the extent of Labeaume's right"; record, p. 293.

Said Act of Congress of June 6, 1874, is not mentioned or referred to in the record or opinion herein, but a federal question was necessarily raised under it, and was decided adversely to plaintiff in error, as the record showed that said Act of Congress was applicable to the case if said patent did not convey the premises sued for.

In Miller vs. Nichols, 4 Wheat. (17 U. S.), 311, 315; Mr. Chief Justice Marshall, speaking for the Court, said:

"It would not be required that the record should, in terms, state the misconstruction of an Act of Congress, or that an Act of Congress was drawn into question. It would have been sufficient to give this Court jurisdiction of this cause, that the record should show that an Act of Congress was applicable to the case"; Hickie vs. Starke, 1 Pet. (26 U. S.), 94, 98; Crowell vs. Randall, 10 Pet. (35 U. S.), 368, 394; Murray vs. Charleston, 96 U. S., 432, 442; Yazoo & Miss. V. Ry. Co. vs. Adams, 180, U. S. 1, 9-14.

Said patent states all of the facts required to make a perfect legal title in said Lebeaume, under said Act of Congress, to said confirmation, and said statements are legal evidence; Wright vs. Roseberry, 121 U.S., 488, 497-499; Langdeau vs. Hanes, 21 Wall. (88 U. S.), 521, 529.

Said opinion of the Supreme Court of Missouri, in this case, sums up the points on which the case is determined, as follows:

"It is fundamental in the law of accretions that the lands to which they attach must be bounded by the river or stream to entitle its owner to such increase.

* * * * * * * * *

"Now in the patent to Labeaume, the river is not mentioned as a boundary. On the contrary, the eastern boundary is a permanent line, fixed by courses and distances, metes and monuments, "Between high

and low water mark"; and the accompanying survey exhibits a tract of fourteen acres or more between the eastern boundary and the river itself.

* * * * * * * * *

"Whatever may have been the original Spanish concession, the survey and patent made under the confirmation, in 1852, must control as to the extent of Labeaume's right.

* * * * * * * * *

"Our conclusion is that as Labeaume was not a riparian owner, his heirs or grantees cannot recover the tract in suit as an accretion.

"The Court therefore erred in admitting the patent as any evidence of title to the land in suit, as it did not purport to convey it to Labeaume.

"Plaintiff, then, having no paper title to the land in suit, is remitted to an actual, continuous adverse possession of the tract as her basis of recovery. She has no color of title by which her possession of a part can extend to the whole."

The latter ruling results from the misconstruction of the patent as a necessary consequence, for if the patent vested in her riparian rights, she then had the legal title which carried with it the constructive possession.

The opinion then states facts bearing on such adverse possession, beginning with those considered as tending to negative the same by plaintiff (also contain-

ing misapprehensions of what the record shows), but instead of deciding the case on them, it shows specifically that no such decision was either made, or intended to have been made, by the concluding statement on the question on p. 296 of record, as follows:

"So much for the negative aspect of her adverse possession."

It then states the affirmative proof for plaintiff in regard to her actual possession of part of her lots, but not extending to or over the premises in controversy, and it then concludes:

"It follows that plaintiff introduced no evidence to show possession or siezin of the tract sued, *within* (should be, for) ten years before the commencement of her action, and the Circuit Court erred in not so holding, as plaintiff had no paper title drawing to her the possession.

"In view of this conclusion, we do not deem it necessary to enter into a discussion of various other incidental questions which arose in the case.

"In our opinion, there was no evidence to sustain the judgment of the Court, and it is accordingly reversed"; record, pp. 282-297.

The decision is exclusively on the legal proposition and no other, that the premises granted by the United States were not bounded on the east by the Mississippi River, so as to entitle either Louis Labeaume, or plaintiff, to alluvion formed to them, but, on the contrary, that the eastern line of them was permanent and fixed by courses and distances, metes and monuments, "between high and low water mark," with the survey ex-

hibiting a tract of fourteen acres or more between the eastern boundary and the river itself. The latter statement is assumed to be true in the opinion, in direct conflict with the statement in the "Remarks" in the patent, record, p. 23, that these 14 acres are a portion of U. S. Survey No. 3333, and aid in making its excess of 21.52 acres over the area of Soulard's survey.

A motion for a rehearing was filed in the case by the plaintiff, based on what she claimed to be a misconstruction of said patent, which the Court denied on July 3, 1899, record, pp. 297-301. Plaintiff's counsel did not state in specific words in said motion that there was a federal question in the case.

The foregoing shows conclusively that there were federal questions properly raised in the case, and that the judgment of the Court was on them regardless of other questions, and it denied to plaintiff in error her title claimed thereunder. This confers jurisdiction on this Court even if there were other questions in the case; Rector vs. Ashley, 6 Wall. (73 U. S.), 142, 147-149; Eustis vs. Bolles, 150 U. S., 361, 367; Johnson vs. Risk, 137 U. S., 300, 306; Dibble vs. Bellingham Bay Land Co., 163 U. S., 63, 69.

All of the other questions in the case were matters of fact, and the verdict on these questions is in favor of plaintiff in error, amply sustained by the evidence and is conclusive in her favor, as the Supreme Court of Missouri does not review such a verdict, and the case was therefore necessarily decided on the federal questions presented; Gibson vs. Chouteau, 8 Wall. (75 U. S.), 314, 318.

Counsel for defendant, in support of their contention that riparian rights are a matter of State law and

within the exclusive jurisdiction of the State Courts, cite the case of St. Louis vs. Meyers, 113 U. S., 566, and others, that pass upon the incidents that attach to grants of land made by the United States bordering on navigable streams and other waters, under State laws, in consequence of the ownership of property conveyed by the general government, but in which cases the validity or construction of the government grants to vest such incidents were not in question. These decisions have no bearing on the question under consideration, which is, does the patent to Louis Labeaume, or his legal representatives, or the Act of Congress of June 6, 1874, when properly construed, as claimed by plaintiff, bound the land granted by the Mississippi River and vest riparian rights in the grantees. The decision of the Supreme Court of Missouri in this case denied this claim of plaintiff, and this decision is a direct adjudication against the validity of a right claimed under a law of the United States and presents a federal question within the jurisdiction of this Court. It has been repeatedly held by this Court, generally without question or comment, that it has jurisdiction under writs of error to State Courts to construe such contested questions under such grants and determine whether they vested such incidents in the grantees, and carried title under State Laws, to high or low water mark or the center of the stream; Shively vs. Bowlby, 152 U. S., 1, 9-10; Grand Rapids and Ind. Rd. Co. vs. Butler, 159 U. S., 87; Packer vs. Bird, 137 U. S., 661; Barney vs. Keokuk, 94 U. S., 324; Knight vs. U. S. Land Assn., 142 U. S., 161, 176. The right to alluvion, while riparian, is not one of the incidents that attach to a government grant under State laws, but inheres in the grant. Such incidents are confined to rights and titles below high water mark; Anthony Falls

Water Power Co. vs. Water Commissioners, 168 U. S., 349, 365. "The sole question in Jones vs. Soulard was of the title, not in the bed or shore of the river, but in accretions which had become part of the fast land"; Shively vs. Bowlby, 152 U. S., 1, 35.

There is one matter of fact in this record that is so persistently put forward by the defendant, that we ask the indulgence of this Court while we present it as shown by the record herein.

For the purpose of locating said lots through the alluvion, plaintiff read in evidence an agreement of adjoining proprietors, establishing a division line through said alluvion. This division line had been accepted as the true line, and acquiesced in by all parties and the public authorities for over twenty years; testimony of Dr. W. M. McPheeters, record, p. 278, and Assessor's plats, pp. 272, 273. Said agreement is as follows:

"It is agreed between Silas Bent and Wm. M. McPheeters that their division line is to be at a point on the west line of Main street, 270 feet north of the north line of Dock street, and said line to run eastwardly parallel with the north line of Dock street to the Mississippi River. St. Louis, April 3, 1873. Mary L. Tyler, by Silas Bent, Sallie B. McPheeters and Mary B. Scott and Julia Crosby, by W. M. McPheeters."

Said agreement is endorsed on a private unrecorded plat, record, p. 10, attached to an abstract of title that was produced on the trial by witness, R. E. Collins, attorney for Mary L. Tyler, and it was retained by him, but he permitted it to be copied. It was not signed by plaintiff, nor any one under whom she claimed title, and it was not in her possession nor under her control.

When plaintiff's attorneys offered this paper (agreement and plat) in evidence, they were asked by Mr. Allen, counsel for defendant, in the midst of the examination of Mr. Collins, if they would undertake to be bound by it, and they replied, "We will concede that"; record, p. 10.

This agreement as to a division line endorsed on a private plat, specifically extends the line between the parties to the river, and as clearly asserts title and claim of ownership by them to the river, otherwise they would not have called for the river in the agreement, but would have stopped at the western wharf line on the plat and have called for the latter line. It disproves any intention of dedicating a wharf. Plaintiff was asserting a title to the river in this action when her counsel read it in evidence for the simple purpose of locating the premises sued for. The concession made in regard to it by counsel for plaintiff to counsel for defendant at that time is, that they conceded its legal effect, whatever that was. Their concession could have no other force as a matter of law, for neither a party nor his attorney can concede or admit away the law in his case; Crockett vs. Morrison, 11 Mo., 3, 5; State ex rel vs. Smith, 150 Mo., 75, 88.

During the pendency of this action plaintiff transferred her interest in it by deed to Arthur B. Barret (her grandson), S. Harper Barret (her granddaughter-in law), and Thomas A. Russell.

Said grantees continued the suit in her name under a statute of February 28, 1858; Laws Mo., 1858-9, p. 36, now embodied in Rev. Stats. Mo., 1899, Sec. 764, as follows:

"When an interest is transferred in any action pending, or hereafter to be brought, other than that occasioned by death, marriage or other disability of a party, the action shall be continued in the name of the original party, if the party to whom the transfer is made will indemnify the party in whose name the suit is to be continued against all costs and damages that may be occasioned thereby, or the court may allow the person to whom the transfer is made to be substituted in the action; and in all such cases the party to whom the transfer is made shall be required by the Court, upon application of the party who made the transfer, either to give such indemnity or to cause himself to be substituted in the action, and upon his omission to do so, the Court shall order the suit to be dismissed."

Instead of requiring her grantees to indemnify her against costs, or be substituted as plaintiffs, plaintiff executed the bond for them required to obtain the writ of error herein; record, p. 303. No one but plaintiff can complain of a failure to indemnify her; Cutter vs. Waddingham, 33 Mo., 269, 284; Spurlock vs. Sproule, 72 Mo., 503, 507; Smith vs. Phelps, 74 Mo., 598, 599; Asher vs. Railroad, 89 Mo., 116, 120; State vs. Philips, 98 Mo., 331, 340; Springfield vs. Weaver, 137 Mo., 650, 670.

Said Arthur B. Barret transferred his interest in the premises sued for, to his mother, Annie F. King, a daughter of plaintiff. Said Annie F. King, S. Harper Barret and Thomas A. Russell, after the decision of the present case by the Supreme Court of Missouri, on July 22, 1899, began an ejectment suit against the same defendants in the Circuit Court of the United States for the Eastern Division of the Eastern Judicial

District of Missouri, alleging, in an amended petition, as the ground of jurisdiction, the proper construction of said patent contested by defendants, as a federal question arising under the laws of the United States.

The jurisdiction was sustained by the Court (but defendant omits the memorandum of the Court on this question, for which see King vs. City of St. Louis, 98 Fed. Rep., 641), a jury waived and the case tried, with two other cases, before the Court, and a verdict rendered for defendants.

The memorandum of the Court on the hearing shows that the questions in the case, to-wit: The boundary of the patent east by the river; the location of the premises as in the case at bar; and possession and seizen of the premises by plaintiffs and their grantors, were all decided in favor of the plaintiffs, and a verdict rendered against them on the sole ground of estoppel *in pais* consisting of what is held to have been a mere recognition of the premises as wharf. No steps were taken to procure a writ of error therefrom, but instead a writ of error was subsequently sued out in the case at bar.

The prosecution by the grantees of plaintiff of another action of ejectment for the premises in controversy resulting in a judgment for defendants is not a cause for dismissing this writ of error, and the only question that can arise under it when this case is heard on the merits is whether said judgment is *res adjudicata* and can be made available as an estoppel; Illinois Central Railroad Co. vs. Adams, 180 U. S., 28, 31; Huntington vs. Laidley, 176 U. S., 668, 679. A judgment in ejectment is not *res adjudicata* between the parties to it, there is no estoppel in one, and it is error

to admit such a judgment in evidence in another action between the same parties, on the same title, with the same defenses, for the possession of the same land. In Sutton vs. Dameron, 100 Mo., 141, 149, the opinion contains the following:

"The well-settled rule of law in this state, notwithstanding an improvident dictum in Foster vs. Evans, 51 Mo., 39, to the contrary, is, actions of ejectment, though between the same parties having the same defenses, concerning the same title and possession, and in all respects similar in their facts, may be maintained *ad infinitum*, so long as equitable defenses are not interposed and ruled upon, thereby converting the whole proceeding into an equitable one, and thus making the adjudication binding"; Whittaker vs. Whittaker, 157 Mo., 342, 353; Swope vs. Leffingwell, 119 Mo., 556, 564; Spencer vs. O'Neill, 100 Mo., 49, 58; St. Louis vs. Schulenberg & Boeckler Lumber Co., 98 Mo., 613, 616; Avery vs. Fitzgerald, 94 Mo., 207, 210; Ekey vs. Inge, 87 Mo., 493, 495; Kimmel vs. Benna, 70 Mo., 52, 62; Strother vs. Lucas, 12 Pet. (37 U. S.), 410, 434. The last is a Missouri case.

Respectfully submitted,

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